Supreme Court, U.S.
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No. 97-1346

In The

Supreme Court of the United States

October Term, 1997

ROBERT CABRAL,

Petitioner,

v.

HEALY TIBBITTS BUILDERS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THIS CASE FAIRLY RAISES THE QUESTION PRESENTED 1

A. THE PROPER READING OF THE OPINION 1

B. THE RESPONDENT'S READING OF THE OPINION 3

C. SUMMARY 5

II. RESPONDENT'S "POLICY CONSIDERATIONS" ARE BOTH MISPLACED AND INCONSISTENT WITH THIS COURT'S DECISION IN *LATSIS* 5

III. RESPONDENT'S LHWCA ARGUMENT IS IRRELEVANT AND UNFOUNDED 7

IV. CONCLUSION 8

APPENDIX A 1a

APPENDIX B 3a

TABLE OF AUTHORITIES

Page

CASES:

Biggs v. Norfolk Dredging Corp., 360 F.2d 360 (4th Cir. 1969) 7

Cabral v. Healy Tibbitts Builders, Inc., 30 BRBS 484 (ALJ 1996) (OALJ No. 95-LHC-1763; OWCP No. 15-39103) 2, 3, 7

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 2, 4, 5, 6, 7

Harbor Tug & Barge Co. v. Papai, 117 S. Ct. 1535 (1997) 1, 2, 4

McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991) 5

Perez v. Keystone Shipping Co., 1997 U.S. App. LEXIS 33804 (9th Cir. Nov. 28, 1997) (No. 96-55994) 2

STATUTES:

Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50 7

LHWCA § 3(e), 33 U.S.C. § 903(e) 7

Jones Act, 46 U.S.C. App. § 688(a) ..... *passim*

OTHER AUTHORITIES:

David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. REV. 79 (1985) 6

PETITIONER'S REPLY BRIEF

Petitioner Robert Cabral respectfully submits this Reply to Respondent's Brief in Opposition.

I. THIS CASE FAIRLY RAISES THE QUESTION PRESENTED

Respondent makes no attempt to defend the Ninth Circuit's holding that an injured employee must work on the high seas (as opposed to the navigable waters of an ocean harbor) to satisfy the *Chandris* requirement that a seaman have a substantial connection to a vessel. Indeed, respondent recognizes that this holding is unprecedented, Brief in Opposition ("Opp. Br.") at 6, and concedes that Congress has not so limited the application of the Jones Act, *id.* at 8. Respondent instead seeks to recharacterize the opinion below. *Id.* at 6-16. The Ninth Circuit, however, has confirmed that the decision below turns on whether the injured employee goes to sea, and defendants in other Jones Act cases are already citing it as authority for the proposition that "brown-water" seamen – *i.e.*, those who do not work on traditional ocean-going vessels – do not qualify for Jones Act coverage. Moreover, respondent's attempted recharacterizations are also inconsistent with this Court's recent rulings.

A. THE PROPER READING OF THE OPINION

Although respondent implies that the lower court's emphasis on the need to go "to sea" was merely rhetorical excess, the Ninth Circuit's entire discussion of *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535 (1997), builds to

the conclusion that when an employee's work is "not of a seagoing nature," his connection to the vessel is insufficient to justify seaman status. *See* Petition for Certiorari ("Petn.") Appendix A ("App. A") at 8a-9a. The critical language in this passage is focused on the importance of " 'whether the employee's duties take him to sea,' " *id.* at 9a (quoting *Papai*, 117 S. Ct. at 1540), on whether the putative seaman's "work . . . was . . . of a seagoing nature," *ibid.* The test that the court derives from *Papai* and *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and applies to the facts of this case, turns entirely on whether the employee went to sea. *See* Petn. App. A at 9a-10a. The Ninth Circuit concludes this paragraph by emphasizing that the Jones Act is reserved for those "who go down to sea in ships." *Id.* at 10a.

In *Perez v. Keystone Shipping Co.*, 1997 U.S. App. LEXIS 33804 (9th Cir. Nov. 28, 1997) (No. 96-55994), the Ninth Circuit confirms this reading. The employer there cited the court of appeals' decision in the present case in defense of a summary judgment in its favor on the seaman status issue. Reversing, the court distinguished its earlier case as follows:

> Keystone's reliance on *Cabral v. Healy Tibbitts Builders, Inc.*, 118 F.3d 1363 (9th Cir. 1997), is unavailing. In *Cabral*, the plaintiff was injured while working as a crane operator on a vessel that was docked at Pearl Harbor. The court found that as a matter of law, the plaintiff could not qualify as a seaman under the Jones Act, despite the fact that he had spent approximately ninety percent of his work time on the ship. *Id.*

at 1366. The present case easily can be distinguished from *Cabral*, however, because Perez was injured while the vessel was at sea.

Respondent may be the only employer of brown-water seamen in the Ninth Circuit who has not yet appreciated the implications of the decision below. Part of the reason that this case has generated such concern among those who represent brown-water seamen on the West Coast (such as the unions who appear as *amici* before this Court) is the frequency with which brown-water seamen bringing Jones Act cases now face summary judgment motions based on the Ninth Circuit's decision. In Appendix A, *infra*, we reprint the relevant passages from two such motions to give this Court a flavor of how the decision below is being used in practice. These motions offer further confirmation that the decision below does indeed raise the question presented in the petition.

B. THE RESPONDENT'S READING OF THE OPINION

If the Ninth Circuit did not mean what it said in its discussion of the need to go to sea, respondent offers no other acceptable explanation for the judgment. The two explanations suggested in the Brief in Opposition are contrary to recent decisions by this Court that the court of appeals discussed in its opinion.

Just as the district court looked to petitioner's "overall employment as a crane operator," rather than "the brief period" of his current employment with the respondent, Petn. App. C at 28a, so the focus of respondent's argument in this Court is on petitioner's "more enduring

period of employment with respondent from 7/14/93 through 10/27/94." Opp. Br. at 2 n.2.[1] This reasoning cannot explain the Ninth Circuit's decision, however, because it is flatly inconsistent with *Latsis* and *Papai*. In *Latsis*, for example, this Court wrote: "When a maritime worker's basic assignment changes, his seaman status may change as well. . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." 515 U.S. at 372. Not only did petitioner's basic assignment change, he left the respondent's employment entirely for 2½ months and had to be rehired. *Papai* is perhaps even more directly on point, for the Court there describes the injured employee's twelve prior employments with the vessel owner during the 2½ months before his injury as "discreet engagements [that] were separate from the one in question." 117 S. Ct. at 1542.

Alternatively, respondent hints at several points that petitioner is not entitled to Jones Act coverage because he

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[1] Respondent seems to suggest that petitioner has taken inconsistent positions with respect to the appropriate period of employment. *See* Opp. Br. at 2 n.2. It is true that petitioner argued before the Ninth Circuit that he spent between 30% and 36% of his time on vessels over the longer period of employment considered by the district court, whereas he spent over 90% of his time on Barge 538 during the relevant period of employment. The argument cited by respondent, however, was made in the alternative, in case the court of appeals failed to recognize the appropriate period of employment. The relevant passage from petitioner's Opening Brief to the Ninth Circuit is reprinted in Appendix B, *infra*.

"was not responsible for operating or maintaining the barge," Opp. Br. at 3; *cf. id.* at 11, and he did not "function[] as a crewmember or deckhand," *id.* at 3; *cf. id.* at 10, 12, 14. These passages seek to characterize the decision below as holding that petitioner did not qualify for Jones Act coverage because he operated the crane rather than the vessel. This recharacterization cannot explain the Ninth Circuit's decision. It is inconsistent both with this Court's holding in *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991), which rejected an "aid of navigation" requirement, and with the court of appeals' own recognition that petitioner's duties contribute to the vessel's function. *See* Petn. App. A at 7a.

C. SUMMARY

In sum, the Ninth Circuit not only emphasized that an employee must "go to sea" to qualify for Jones Act coverage, but read this as a requirement that he work on the high seas. No other explanation for the Ninth Circuit's decision withstands scrutiny. We can only conclude that the court of appeals meant what it said, and that it has imposed a requirement on West Coast employees that does not apply in any other circuit.

II. RESPONDENT'S "POLICY CONSIDERATIONS" ARE BOTH MISPLACED AND INCONSISTENT WITH THIS COURT'S DECISION IN *LATSIS*

Relying on the scholarly work of Professor David W. Robertson, respondent argues that policy considerations

support the decision below. Opp. Br. at 16-21. This argument is both misplaced and inconsistent with this Court's decision in *Latsis*.

In *Latsis*, this Court considered and rejected these same policy arguments (raised in a brief authored by Prof. Robertson). The Court instead held that "[s]eaman status is not coextensive with seamen's risks." 515 U.S. at 361. If the Court wishes to reconsider this holding, it should be after plenary consideration.[2] It is not the Ninth Circuit's role to adopt a policy-based rationale that this Court has rejected.

In any event, respondent's argument is misplaced, for crane operators working on moored barges do face the "perils of the sea" as Prof. Robertson uses the term. *See generally* David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. REV. 79, 80-81 (1985). Working from a floating vessel that moves, rolls, pitches, and yaws with the sea is a different – and more perilous – job than operating a shoreside crane that stands firmly on solid ground. Indeed, it appears that petitioner was injured when he slipped on some mud that had been dredged from the harbor bottom and left on the barge the previous day when the vessel had weighed anchor. This is a risk that is unique to those who work on the water, and would not be faced by a crane operator on the land. Petitioner's exposure to the perils of the sea is not more

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[2] If the Court wishes to reconsider Prof. Robertson's policy arguments, this would be a particularly appropriate vehicle for doing so. Prof. Robertson would argue the case for petitioner if certiorari were granted, and thus the Court would have the opportunity to probe his views.

fully developed in the record and the proceedings below only because petitioner did not have fair notice that this factor would be determinative, as indeed *Latsis* had held that it was not.

III. RESPONDENT'S LHWCA ARGUMENT IS IRRELEVANT AND UNFOUNDED

Finally, respondent suggests that petitioner's actions in seeking compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-50, is inconsistent with his claim to seaman status here. *See* Opp. Br. at 22-24. This argument is irrelevant and unfounded.

Because of the confusion surrounding seaman status, many seamen seek LHWCA benefits while pursuing Jones Act remedies. There is no risk of double recovery, however, because any LHWCA payments operate as a credit against the Jones Act verdict, and vice versa. *See* LHWCA § 3(e), 33 U.S.C. § 903(e); *Biggs v. Norfolk Dredging Corp.*, 360 F.2d 360 (4th Cir. 1969). The fact that petitioner sought LHWCA benefits here is not a reason to deny certiorari; instead it is a powerful argument for the need to grant certiorari and clarify the confusion that imposes on injured workers the need to pursue parallel proceedings.

In any event, respondent's argument is factually unfounded. Even in the LHWCA proceeding, petitioner contended that he qualified as "a 'seaman' as that term is used in the Jones Act, and is therefore entitled to seek the various remedies provided in that legislation." *Cabral v. Healy Tibbitts Builders, Inc.*, 30 BRBS 484, 488 (ALJ 1996) (OALJ No. 95-LHC-1763; OWCP No. 15-39103). Furthermore, contrary to respondent's claim, ALJ Mapes did not

"independently find[] that petitioner was a longshoreman under the LHWCA." Opp. Br. at 22-23. He simply "adopt[ed] the conclusions of the District Court." 30 BRBS at 488.

IV. CONCLUSION

The petition for a writ of certiorari should be granted. In view of respondent's concession that "Congress [has] never limited application of the Jones Act to individuals who work on the 'high seas' or 'open seas,' " Opp. Br. at 8, the Court may also wish to consider summary reversal as an alternative procedure for clearing up the confusion created by the Ninth Circuit's decision.

Respectfully submitted,

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April 20, 1998

APPENDIX A

Memorandum of Points and Authorities in Support of Manson Construction Co.'s Motion for Summary Adjudication Pursuant to CCP 437(c)(f)(1), *Baker v. Manson Construction & Engineering Co.*, No. 986153 (Cal. Super. Ct., San Francisco County, 1997), at 6:

> The *Cabral* court held that the purpose of the focus on the "substantial nature" (of the plaintiff's connection to a vessel) is "to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks." *Cabral, supra,* 118 F.3d at 1366 [*cf.* Petn. App. A at 10a]. The Ninth Circuit further noted that "[t]he inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's *duties take him to sea.*" *Cabral, supra,* 118 F.3d at 1366 [*cf.* Petn. App. A at 10a] (quoting *Papai, supra,* 117 S. Ct. at 1540) [emphasis supplied by author of memorandum]. The *Cabral* court concluded that even though he was operating a crane on board a barge located in the water, Cabral's work did not expose him to sea-based hazards, and therefore he did not have the requisite connection to a vessel to be a Jones Act "seaman." *Cabral, supra,* 118 F.3d at 1366 [*cf.* Petn. App. A at 10a-11a].

Memorandum of Points and Authorities in Support of Defendant Connolly Pacific Co.'s Motion for Summary Judgment or, in the Alternative, for Summary Adjudication, *Barton v. Connolly Pacific*, No. NC 020911 (Cal. Super. Ct., Los Angeles County, 1997), at 15-16 & n.6:

> On this issue [seaman status], this case mirrors the Ninth Circuit case of *Cabral v. Healy*

Tibbitts Builders, Inc., 97 Daily Journal D.A.R. 12902 (9th Cir. October 16, 1997), in which the court found that a crane operator working 90 percent of his worktime aboard a crane barge on a construction project in Pearl Harbor was not a seaman for Jones Act purposes.[6] In examining whether the plaintiff had a connection to a vessel in navigation that was substantial in terms of duration and nature, the court focused on whether the plaintiff's duties were primarily sea-based. The Ninth Circuit in *Cabral* concluded that the plaintiff was a land-based worker who was hired to work on the barge as a crane operator and not as a crewmember. It emphasized that the plaintiff presented no evidence showing that he was ever aboard the barge when it was anywhere but the Ford Island Ferry Project or that he would have continued to work aboard the barge once the project was completed. Thus, the plaintiff was held as a land-based crane operator who happened to be assigned to a project which required him to work aboard a barge. Thus, he was not a seaman.

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[6] For the purposes of its analysis, the *Cabral* court assumed that the barge was a vessel.

APPENDIX B

Plaintiff-Appellant Robert A. Cabral's Opening Brief, *Cabral v. Healy Tibbitts Builders, Inc.*, 128 F.3d 1289 (CA9 1997) (No. 95-16476), at 16:

> *Chandris, Inc. v. Latsis, supra,* does not support the proposition that Cabral's duties for defendant before he was terminated/discharged on or about June 1, 1994 should be considered in determining Cabral's status as a seaman. Indeed, the plaintiff in *Chandris,* although he had a mix of land based and sea based employment, was in fact continuously employed by the same employer. Cabral was not. Cabral last worked for defendant about 2½ months before he was hired to work on Barge 538 by defendant.[1] In between he worked for another employer and was unemployed. Being discharged and rehired is a new work assignment and seaman's status should be determined based on the new assignment.

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[1] Interestingly, depending on how one does the mathemation [sic], even if his pre-termination/discharge employment is considered, an argument could be made that Cabral spent between 30-36% of his time on defendant's vessels. ER 11-12. Some courts find seaman status if more than 30% of the time is spent on a vessel. *Chandris, Inc. v. Latsis, supra* at *12 [515 U.S. at 371].